53

1952. File No. O Contract 52

P 49E

Legal Department—
A BRANCH

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Subject:— Opinions under the Indian Contract Act, 1872

File No. O. Contract/52

Gen. 194

201-P

C O N T E N T S.

Legal Department Vol. No. O.Contract/1952.

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27.	R.I.No.1398-Conf1/ 10.12.52 O.No.1416 Conf1/ 18.12.52	Contract given to M/S Coir Produce and Allied Agencies, Allepey for supply of equipment for coir factory, The firm supplied equipment valued at Rs. 19,907 but on inspection, it was found that the same was really worth Rs. 8,077/only. The Firm was already given an advance of Rs. 7000/- through M/S Hindustan Fibre Industries, Bombay which was a bogus concern set up by the Fibre Officer, Shri Kannat Question whether andif so, how it could be possible for Govt. to take any further action in connection with the recovery of the amount of Rs. 7.../- from M/S Coir Produce and Allied Agencies, Allepey.	99 -
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S .C. 27/6
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Confidential Legal Department.

The Department of Industrial Co-operatives and villages Industries wanted to make purchases of certain rope making machines and for this purpose a purchase committee was ap ointed by the Joint Registrar with the Fibre Officer and some other officers as members. This Purchase Committee invited quotations and after scrutinising them recommended that the machines should be purchased from Messrs. Hindustan Fibre Industries, Ltd., Bombay, as their quotations were the lowest. Orders were accordingly placed with the firm and 17 machines were purchased and a sum of Rs. 11,671-8-0 being the price of 14 machines was also paid. It has now come to light that the Fibre Officer made the actual purchases from Messrs. Brunton & Co., Cochin, and this firm actually supplied the machines to the various centres as directed by him. This firm has not been paid for the supplies and has preferred its bills to the Registrar; The Fibre Officer has admitted that in placing the orders with Messrs. Brunton and Co., he has committed a fraud. From the copies of correspondance submitted by the firm, it appears that the orders were placed by the Fibre Officer in February and March 1950. The Fibre Officer who placed the orders with Messrs. Brunton & Co. was not authorised to enter into a contract with the firm nor does the correspondence show that it was carried on on behalf of Government It is, therefore, clear that any contract ~~xxx~~ entered int by the Fibre Officer is not binding on Government. It appears that it was only the Director of Industries and Central Stores Purchasing Officer who was competent to execute contracts on behalf of Government. "In respect to the acts and declarations and representations of public agents it would seem that the same rule does not prevail which ordinarily governs in relation to mere private agents. As to the latter the Principals

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are in many cases bound where they have not authorised the declarations and representations to be made. But in the case of public agents, the Government or other public authority is not bound unless it manifestly appears that the agent is acting within the scope of his authority or he is held out as having authority to do the act or is employed in his capacity as public agent to make the declaration or representation for the Government. Indeed this rule seems indispensable in order to guard the public against losses and injuries arising from the fraud or mistake or rashness and indiscretion of their agents. By the law of agency at the common law there is difference between individuals and the Government - the former are liable to the extent of the power they have apparently given to their agents, while the Government is liable only to the extent of the power it has actually given to its officers. And there is no hardship in requiring from private persons dealing with public officers the duty of inquiry as to their real or apparent power and authority to bind the Government " (see Secretary of State v. Kasturi Reddi , I.L.R. 26 Madras 268 at p. 279). Thus in another case of Secretary of State v. Sulemanji Moosaji (I.L.R. 26 Bombay 801), the plaintiffs sued the Secretary of State and one overseer for the price of bamboos sold to the overseer for the purpose of erecting sheds during an epidemic of plague. The plaintiffs alleged that they supplied the bamboos to the overseer on his representing that he was acting under the orders of the Assistant Collector and the Mamlatdar. The Government denied that they had ever authorised the purchase of the bamboos. The court held that there was no evidence to show that the overseer was authorised by Government to purchase

the bamboos and to pledge the credit of Government for payment, or that the acts of the overseer had ever been ratified by Government or by any officer of Government duly authorised in that behalf. It is, therefore, clear that it was the duty of Messrs. Brunton and Co. to enquire into the question whether the Fibre Officer was competent to place the orders with them. If, without makingsuch enquiries, they, supplied any machines, the Government is not liable for the payment. Government will have, however, to return the machines if it proposes to repudiate the contract alleged to have been entered into by the Fibre Officer.

Sd/ J.R. Dhurandhar.
21-1

Additional Secretary to Government.

U.R. to D.D. No. 87-Confl. dated the 21st January 1952.

S.C. 25/6

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Office of the R.L.A.

A customer who has power to draw cheques has also power to countermand payment (Bansilal v. Sadasheo I.L.R. (1943) Nag. 687). This right to countermand exists only upto the time ofpayment. The effect of countermand is to leave the balance in the hands of the bank as if no cheque had been issued. No action can therefore be taken by Government against the firm for instructing its bank to withhold payme-nt of the cheque. Action can however be taken against the firm for non-fulfilment of the contract. It is, however, for the administrative Department to consider whether wuch action is advisable in this case.

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Remembrancer of Legal Affairs.

U.R. to D.D. No. 64-Confl. dated the 15th January 1952.

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The view taken by the Dy.Secretary, R.D., is correct. It is apparent from the papers underlying the decision at the Conference between the members of the Bombay Port Trust Deputation and the H.E. (R.D.) that the rates of Government land and that of the Bombay Port Trust, land to be exchanged were settled by way of concession and those rates could not be adherred to when the proposal for exchange has fallen through. Besides, the decision at the Conference would not constitute a contract unless it has been reduced to writing in proper form as provided in Article 299(1) of the Constitution of ~~Xxx~~ India. It would, therefore, be competent for Government to demand the market value for the sale of its land to the Bombay Port Trust.

Reply may be as in para 2.

RTK. 7-3

E R.L.A. P.M.Lad 7-3

U.R. to R.D. No. 3693 , dated the10th March 1952

S.C. 25/6

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Cancellation of the tender - Recovery of excess expenditure.

It appears that Messrs. H.V. Construction Co. were given a contract for construction of a reservoir for the Karad Water Supply Scheme for a sum of Rs. 58,667/-, The firm, however, did not progress with the work satisfactorily and, therefore, the contract was cancelled under clause 3(c) of the tender. Fresh tenders were, thereafter, called and the unfinished work was entrusted to Messrs. J. H. Billimoria of Bombay and Shri N.D.Vaidya of Poona who carried it out for a sum of Rs. 76,554. On account of the failure of theoriginal contractors Government has suffered a loss of Rs. 16,304 andin order to recoup theloss Government has forfeited the deposit of the Co. as well as the sum due to it on account of thework done. Government has thus reimbursed itself to the extent of Rs. 10,956 but still a sum of Rs. 5348 /- is outstanding. The question for R.L.A.'s consideration is whether this amount can be legally recovered from the contractors.

2. Clause 3(c) of the Tender whereunder the contract was rescinded provides that "in any case in which under any clause or clauses of this contract the contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit (Whether paid in one sum or deducted by instalments) or in the case of abandonment of thework owing to serious illness ordeath of the contractor or any other cause, the Executive Engineer, on behalf of the Governor of Bombay shall have power to adopt any of the following courses, as he may deem best suited to the interests of Government :-

(c) To order that the work of the contractor be measured up and to take such part thereof as shall be unexecuted out of hishands; and to give it to another

contractor to complete, in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor, if the whole s work had been executed by him (as to the amount of which excess expenses the certificate in writing of the Ex. Engineer shall be final and conclusive) shall be borne and paid by the original contractor and shall be deducted from any money due to him by Government under the contract or otherwise or from his security deposit or the proceeds of sale thereof, or a sufficient part thereof". It is clear from this provision that the whole of the excess can be legally recovered from the original contractor and for recovering the seme a suit would have to be filed, If Government decides to file a suit the provisions of Rules 108-109 of the Law Officers Rules may be followed and a report may be submitted to Legal Department for further action.

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Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 5117 , dated the 4th April 1953.

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Wagon condition in Forest Contracts.

It will be noticed from condition No. 9 of the Sale Conditions that the bidder is required to pay the full amount of the bid within Six months after closure of the Auction. It is further made clear in condition No. 15 which gurn guarantees wagons that "This concession will not apply in the case of those who pay part of the bid amount. In any case wagon guarantee concession will not be given to those who do not pay purchase money in full as required by the above condition". From the statement submitted by the Divisional Forest Officer, Belgaum, it appears that Shri Kodkany has not paid the full amount in respect of any sale except the one at serial No. 5A. He is not, therefore, entitled to claim the wagon facility in respect of the other sales and Government would not be liable to pay him any damages for the loss incurred by him in those transactions. As regards serial No. 5A, however, wagons not having been supplied within the specified time the contractor would be entitled to claim refund of his money.

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U.R. to A. & F.D. No. 5130 , dated the 4th April 1952.

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The view expressed by the District Government Pleader Panch Mahals is correct.

It is not possible to amplify the condition in the Jahirnama as proposed by the Chief Conservator of Forests. Since the condition already provides that a tender put in by a minor cannot be accepted, every individual contractor should be required to state his correct age in the tender-form which may, if necessary, be suitably modified.

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Remembrancer of Legal Affairs.

U.R. to A & F.D. No. 8436 dated the 20th May 1952.

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Clause 2 of the conditions of contract provides that the time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date on which the order to commence work is given to the contractor. The work shall throughout the stipulated period of the contract be proceeded with, with all due dilligence (time being deemed to be of the essence of the contract on the part of the contractor) and the contractor shall pay as compensation as amount equal to one per cent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide, of the amount of the estimated cost of the whole work as shown by the tender for every day that the work remains uncommenced, or unfinished, after the proper dates. Ea Clause 6 of the contract provides for the procedure to apply for extension. A * contractor who fails to take advantage of that clause and who is still guilty of the breach of the condition regarding time would normally be liable to pay compensation, unless, as provided for by paragraph 3 of section 55 of the Indian Contract Act, Government have accepted performance of the contract at any time other than that agreed without even giving notice at the time of such acceptance that Government propose to levy compensation as provided for by clause 2, In all other cases the contractor would be liable to pay compensation. Granting ex post facto sanction to extension of time is opposed to the terms of the contract and would not be expedient as it means re-writing the contract and for individual cases. Moreover, it is doubtful whether paragraph 216 of the Bombay Public Works Department Manual, Volume I - Orders, can be invoked for condoning the delay. The proper procedure in such cases, if the Department feels genuinely satisfied that there were valid reasons for not taking recourse to clause 6, is to fix a nominal amount of compensation within the discretion of the

Superintending .....

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Superintending Engineer under clause (2).

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U/R. to P.W.D. No. 9034 , dated the 30th May 1952.

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The P.W.D. considers that when under the terms of the contract extension is granted there can be no questio of recovering ecxr compensation from the Contractor for delay. R.L.A. is requested to examine the issue with reference to clauses 2 and 6 of the Conditions of Contract.

Similar question was recently examined by the R.L.A. and attention of the P.W.D. is invited to the R.L.A.'s opinion no. 9034 dated 30-5-1952

Sd/- 31-5

R.L.A. P.M.Lad
31-5

U.A. to P.W.D. No. 9241 / 3-6-52.

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Torts Claim for damages from private carrier tke for loss of manure-mixture while transporting them.

It appears that Messrs. R.N. Curve of Ratnagiri was given a contract of transporting manure mixture within the district by sea route on conditions stated in thebond entered into by the contractor. Accordingly on 3rd April 1951, thecountry craft Vithal Prasad Coa No. 134 captained by Hindal Narayan B. Gaonka was loaded with 901 bags and was waiting in themid-stream for sailing on the next morning. It has to wait to complete the shipping documents from the customs Authorities. In the evening when there was low t de the sd craft touched the ground and rested in a tilted position. During thehigh tide water entered the hold damaging completely 317 ba s, 147 bags wam saturated with water and other bags being thrown in the wa It appears that the Insurance Co. has rejected the claim on the ground that the customs documents were not completed prior to insuring the goods. The R.L.A. is requested to advise whether it would be legal to recover the loss from the contractor particularly as theloss is caused by"Act of God."

2. Under clause 1 ofthe terms of thecontract the contractor's rate quoted includes 10 % weighment and lightrage at both ends, insurance and sea freight. Under clause 4 the contractor will have to deposit Rs. 500/- a cash as goodwill amount which will be returned to him at the completion of the work. Under clause 7 any loss more than 2 lbs. per bag will be recovered from thecontractor. Under clause 8 it will be the responsibility of thecontractor to protect the Government goods in transit from rain, theft etc. by providing tarpolins, watchmaa. etc. Under clause 9 on breach of terms and conditions and any loss to Government will result in the forfeiture of the deposited amount and under clause 10 also the contractor and his legal heirs are made liable for the olss if thes loss is more than the deposit amount. It is clear from the terms of the contract that Messrs. R.N.Surve had to insure the goods and any loss of more than 2 lbs. per bag was recoverable from them. It does not appear from the papers that the contractors had taken out a proper policy covering the commencementof the

risk directly the goods leave the shore before they are loaded on the country craft. Had such an express clause been included in the policy there would have been no difficulty in recovering the claim (see Arnold on the law of Marine Insurance and Average Vol. I p. 448). The defence of "act of God" is available only to a common carrier. A person who carries another's goods by special contract and does not profess to carry the goods of any member of the public and forwarding agent who merel, collects goods for transmission by railway are not common carriers. In the present case the contractors do not seem to be common carriers in this sense and therefore the defence on the ground of "act of God" would not be available to them. The phrase "act of God" was defined in Nugent v. Smith (1877) 2 A.C. 743 as an accident that is due to natural causes direclty and exclusively without human intervention and that could not be prevented or averted by the exercise of reasonable care. A tempest, a cyclone, an unusual fall of ~~xx~~ snow, and a fire caused by lightning have been held to be acts of God; but not a fire due to an act of man, theft, a robbery or an accident in the course of navigation to which natural causes might have contributed as where a vessel was steered on to a shoal during a fog (see Liver Alkali V.v. Johnson (1874) 7 Ex. 267; Iyer's Law of Torts p. 255). In this case, it is stated that when the craft was waiting for clearness of customs documents there occured a low tide and it touched the ground and rested in a tilted position and during the high tide the water entered the hold. It would thus appear that the cause of the accident was due to course of navigation and not "act of God" and even this defence would not be available unless he is considered as a common carrier. The best course therefore would be to forfeit the deposit amount under clause 9 after giving the company a proper show cause notice and to ask them to make good the entire loss under clause 10 of the agreement.

Sd/- P.M.Lad
20-6

Remembrancer of Legal Affairs.

U.R. to A. & F.D. No. 10374 , dated the 21st June 1952.

Office of the R.L.A.

Condition 13 of the conditions of the Auction is in the following terms.

> "13. The highest bidder to whom the licence is knocked down shall pay at once the amount due from him, unless the Collector has extended the time of payment, otherwise the licence will be re-auctioned. If the price realized at the second auction is less than at the first, the defaulting bidder shall pay the difference. "

The above condition refers to the defaulting bidder paying the difference between the value of the two bids. This amount is recoverable not by way of penalty but with a view to recouping the loss incurred by Government on account of the failure on the part of the bidders to abide by the conditions of the auction. The condition must be construed strictly and confined to the purpose for which it is intended. It would not be permissible to import into that condition on additional liability for interest (cf. 4 Bom. L.R. 814 (Mohanlal Tribhuwandas Vs. Chunilal Harinarayan) and I.L.R. 38 Cal. 458 (Nabinchandra vs. Krishna).

Sd/- P.M.Lad
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Remembrancer of Legal Affairs.

U.R. to R.D. No. 10375 , dated the21st June 1952.

S.C. 26/6

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It appears from the draft agreement at p. 141 of the file that the contractor Bhagwandas was required to deposit a sum of Rs. 2,000. If he has made the deposit, it can be forfeited by Govt. for the breach of the condition 13 of the draft agreement was though the agreement has not been formarally executed. If no such deposit has been made by Bhawandas, no action beyond black hesting heir can be taken by Govt.

Sd/- R.T.K./ 2-8

R.L.A.

Sd/- P.M.Lad
2-8

U.R. to D.D. No. 13036 dated 7th August 1952.

S.C. 26/6

4 copies.

Office of the R.L.A.

While issuing orders imposing a nominal penalty for the extension the Public Works Department appears to have relied upon another case considered by the R.L.A. in his opinion No. 9034, dated 30th May 1952. In that opinion the R.L.A. considering clauses 2 and 6 in a similar form of contracts had expressed the view that a contractor who failed to take advantage of clause 6 and who was guilty of breach of the condition re: time would normally be liable to pay compensation, unless as provided for by para 3 of section 55 of the Indian Contract Act, Government had accepted performance of the contract at any time other than that agreed without even giving notice at the time of such acceptance that Government proposed to levy compensation as provided for by clause 2. The Superintending Engineer, Bombay Circle , in para 4 of his letter dated 8th July 1952 has stated that as the work at first commenced by thecontractor in April 1950 was stopped by Government, theExecutive Engineer having allowed its commencement without having authority to incur expenditure, the contractor was not bound to finish the same within the stipulated time i.e. before 4th April 1951. That is no doubt true. But the position here is slightly different. When the Executive Engineer permitted the contractors in November 1951 to finish the superstructure before 14th March 1952 and the contractor agreed not to claim compensation on account of the intervening idle periods, the whole thing resulted in the substitution of a new contract for the original within the meaning of section 62 of the Contract Act. According to that contract the contractor had agreed to complete the work of the superstructure before 15th March 1952. Other terms of this new contract were similar to the original one. The question is of according sanction to the extension of the period after

15th ...

15th March 1952. If the Public Works Department is satisfied that there work valid reasons for the failure of the contractor to apply for extension as provided for by clause 6, there would be no legal objection to asking for a nominal compensation under clause 2. However the period to be extended should be from 15th March 1952 and not from 4th April 1951 as stated by the Public Works Department, The view expressed by the Superintending Engineer, Bombay ~~Kirkm~~ Circle in para 4 of his letter dated 8th July 1952 does not appear to be correct.

Sd/- P.M.Lad
19-8
Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 13591 , dated the 20th August 1952.

S.C. 26/6
4 copies.

L.D.R.I.No. 14049 dt. 15.7.52.

Every tender is an offer and can be revoked or modified b before it is accepted As Shri Lobo modified his tender before it has accepted by the Surgeon General, it would not be legally feasible to forfeit his earnest money.

Sd. R.T.K.
30-7

Sd/- P.M.Lad
30-7

R.L.A.

U.R. to surgeon General with the Govt. of Bombay No. 12745 dated 1st August 1952.

S.C. 26/6
4 copies.

Office of the R.L.A.

The view taken by theJoint Director for Industrial cooperative and Village Industries, B.S. Poona is not correct. It is clear from the facts that Shri Kannat had practised fraud on Government as well on Messrs. Brunton & Co. and the company has been duped as a result of the fraud. As Shri Kannat was not authorised by Government to enter into the contract it is open to Government as advised in Additional Secretary's Opinion No. 87-Confl. dated the 21st January 1952 to repudiate the contract; but if it does so it will have to return the machines. If, however, it is proposed to retain the machines, Government would in equity be bound to pay the value of them to Messrs. Brunton & Co. to the machines were supplied by Messrs. Bruton & Co. to the Fibre Officer Shri Kannat in pursuance of his orders. It is not correct to say that the machines were supplied by and in the name of Messrs. Hindustan Fibre Industries although Shri Kannat may have so represented to Government." A master whose servant has committed frauds, may, by his conduct be estopped from denying the servants authority to do the acts out of which the frauds arise and he has to bear theloss under the rule of law that where one of two innocentpersons must suffer loss through the acts of a third person, he who has enabled the third person to occasion the loss must sustain it." (Farquharson Bros. & Co. v. King & Co., 1901, 2 K.B. 697). In view of this position, if Government proposes to retain themachines, price of the machines will have to be paid to the company from whom they were in fact purchased by the Fibre Officer. Government may, therefore, decide what course should be followed and eventually if a suit is filed action as laid down in Rules 68-72 of the Law Officers Rules may be taken.

Sd/- P.M. Lad
Remembrancer of Legal Affai

U.F. to D.D. No. 820-Cpnf Cp Confl. dated the 20th August 1952.

L.D.R.I.No. 18990 dated 8.8.1952

The view taken by H.D. is correct .
The second auction implies that the bids offered at the first auction were not accepted by the Inspector General of Prisons.

Sd. R.T.K.
27-8

R.L.A.

Sd. P.M.Lad
27-8

U.R6. to H.D. No. 14107 dated 29-8-52

Office of the R.L.A.

There is no objection to making further inquiries as desired by Secretary, Finance Department and Development Department may further investigate the case on the lines indicated by him. From the copies of the correspondence submitted by the company, however, it appears that the correspondence was carried on by the Co. with Shri Kannat as Government Officer and even the goods were supplied to the Coir and Fibre Schools direct. There is, therefore, no reason to suspect the bona fides of the Co., but there is no objection to investigate the matter as desired by Secretary, Finance Department.

Sd/ P.M.Lad
9-9
Remembrancer of Legal Affairs.

U.R. to D.D. No. 903 / A Confl, dated the 10th September 1952.

S .C. 26/6

4 copies.

Office of the R.L.A.

The indenture of 1894 provides for lease of the lands with exclusive right to use the water power at the said falls of Gokak so far as the same shall be actually required for the works of the lessees hereinafter mentioned or referred to. The words "shall be actually required" qualify the preceding words "water power " and not water. It is, therefore, apparent that what is granted is not the supply of water but the right to generating energy at the falls. "Works of the lessees hereinafter mentioned or referred to " means the works of the lessees mentioned in covenent No. 3 in the indenture.

3. Under section 37 of the Bombay land Revenue Code the river vests in Government. This right of Government is subject to the natural right of a riparian proprietor, which right means the use of water for ordinary purposes, that is to say, for washing, drinking and domestic purposes and for his cattle ad lavandum at ad potandum (see section 7(j) of the Indian Easemonts Act). Under section 55 Government has a right to claim rates for the use of water vesting in it. It appears, therefore, that, although the mills can use the water of the river for drinking purpose, it is difficult to support its claim for use of water for industrial purposes and for gardening. Consequently, Government can press its claim for water rate for the supply of water for gardening and industrial purposes, but not for supply of water for drinking purposes.

Sd. P.M.Lad
29-9

Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 16094/4 , dated the 29th September 1952.

Office of the R.L.A.

It is true that under para. 1(i) of the Defence Ministry's letter No. 1/356/P/IH & D/3021-LH/D(a)/51, dated 5th September 1951 the State Governments are required to communicate their acceptance or otherwise within one month from the receipt of the offer; but the only result of a failure to do so is that the property is liable to be sold by auction in the open market (vide clause (ii) of para 1). The letter does not make the State Governments liable for damages or rent in case of their failure to communicate acceptance or otherwise within the prescribed period. In view of this position and in view of the fact that the offer of this Government for purchase of the property was not accepted by the Government of India before its revocation, this Government will not be liable for the rent of the premises in question. The view taken by the R.D. is correct.

Sd./ P.M.Lad
1-10

Remembrancer of Legal Affair

U.R. to R.D. No. 16275/A dated the 3rd October 1952.

S.C. 26/6

4 copies.

Office of the R.L.A.

econditioned Tractors contract for supply of - Breach of Warranty by seller.

It appears that the view expressed by Shri Tarlo, Legal Advisor to the Deputy Director, Indian Supply Mission, Washingtom, dated the 5th May 1952, and concurred in by the Solicitor attached to the Ministry of Works, Production and Supply of the Government of India is correct. The main question for consideration is whether the tractors supplied by Messrs. Casavan General Supply Company, New York, were in suitable working condition and used not more than 2,000 hours. It was one of the conditions of the purchase that the tractors should have been certified as satisfying that condition by Messrs. Robert W. Hunt Company. Messrs. Robert W. Hunt Company have reported that the meters attached to the tractors showed less than 2,000 working hours and the reconditioning of the tractors had been undertaken and they were in a satisfactory working condition. Unless that certificate has been challenged as false or fraudulent, it would not be possible to say that the tractors were not in a suitable working condition when they were transported from America. It is very difficult to prove that the certificate of Messrs. Robert W. Hunt Company is false or fraudulent, particularly in view of the fact that the tractors seem to have been damaged by rust and sludge during transport. It may be that some of the parts ofthese tractors were found missing when they were received in India. But the absence of these parts would not prove that the tractors were not in suitable working condition when they were transported from America. In view of these circumstances, and in view of the fact that Messrs, Casavan General supply Co. has become bankrupt, it does not appear worthshile to pursue the point and press the claim any further.

Sd. P.M.Lad / 26-9
Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 15963/I , dated the 27th September 1952

S.C. 26/6

4 copies.

Office of the R.L.A.

/Contract for supply of Tangye engines.

Indian Contract 1872. Secs. 55 & 63.

It is no doubt true that in both the letters thereunder orders were placed with Messrs. Drewet Chowma Co. for the supply of Tangye Engines, it was specifically stated that the order was placed on thedefinite understanding that the delivery should be given by a specified time, i.e. by the end of 1951 in the case of the first 100 engines and by theend of February 1952 in the case of the rest 55 engines. But while accepting the orders of Government the firm informed Government that there would be a slight delay in delivery in the first instance in view of the delay on thepart of Government in placing the order and in the latter instance in view of the difficulty of securing raw materials by the manufacturers. It does not appear to have suggested or agreed to at any time that the delivery should be given or given taken as and when the firm was able to do so. However, it appears that delivery of nearly 78 or 80 engs was taken from time to time by Government up to the beginning of May 1952. Government in its letter dated 30th May 1952, while acknowledging the acceptance of the delivery of about 80 engines, enquired about the approximate date of the delivery of the remaining engines and requested the firm to communicate as early as possible. In reply the firm in its letter dated 2-6-1952 informed Government that -

(a) 8 engines of 10 H.P. had already been shipped- 3 already arrived and 5 were shortly due;

(b) 5 engines of 8 H.P. had been ~~will be~~ shipped per s.s. circassia against Government order dated 23.11.51.

(c) 5 engines of 8 H.P. were ready for shipment and will be shipped by the first available steamer against Government order dated 23.11.51

On the 26th June 1952 the firm further informed Government that their blanket licence was due to expire on 30th June 1952 and Government should secure for them

a ....

a special licence for the import of the balance of the engines. on 15th July 1952 Government for the first time wrote to the firm that no further extension of time could be given and the order forthe remaining 75 engines should be treated as cancelled and it would not be possible for Government to take delivery of any further engines in respect of theorders placed with the firm. In the meantime, the firm in theletter dated 7th July 1952 had informed Government that 10 engines of 8 H.P. were already ready for delivery and requesting Government to arrange to the take delivery of thesame and further 10 engines of 8 H.P. had been already shipped per s.s. Caledonia and thereby a balance of 45 8-H.P. engines only would remain against theabove two orders. In reply to Government's letter dated 15th July 1952, the fir-m has written to Government protesting against the cancellation of the order and requesting Government to take delivery of 30 engines wh ch they have now on hand, and as regards the rest threatening to hold Government responsible but willing to get the order cancelled by the makers and to relieve Government if they succeeded in doing so.

In view of these facts it appears clear that although in thebeginning Government wanted to maketime essence of the contract, Government can later be said to have decided to waive and relax the time restriction. If Government wanted to take treat time as an essence of th contract, it was open to them to avoid the contract and claim compensation which they did not do. On the contrary they accepted delivery of the engines even after the expiry of the period in respect of both the orders and impliedly agreed to allow the firm to make delivery of the remaining 8 engines, by enquiring theapproximate date of the delivery of the remaining engines in their letter dated the 30the May 1952. In view of these circumstance: it appears that Government would be deemed to have agre t extend the time for the performance of the agreement

by the firm. (Section 55 and 63 of theIndian Contract Act, 1872). It is no doubt true that in their letter dated 15th July 1952 Government wrote to the firm that no further extension of time would be granted but by that time the firm had already offered to deliver some engines which Government was not entitled to refuse to accept. Consequently, Government would be required to accept the delivery of such engines which the firm had offered by 15th July 1952 and in respect of the remaining engines which were not ready for delivery by that time, it was open to Government to cancel the contract. In the circumstances, it appears that Government will have to accept the engines the delivery of which was offered to Government by 15th July 1952.

Sd/ P.K.Lad
9-10

Remembrancer of Legal Affairs.

U.R. to A. & F.D. No. 1039/A-Confl. dated the 10th October 1952.

S.C. 26/6

4 copies.

Office of the R.L.A.

It appears that Government has agreed to take delivery of 33 National engines of JB type on payment of Rs. 1,25,812-8-0 as per bill of Messrs. Turner, Hoare & Co. Ltd. but Government desires that the Company should keep the engines ± with it subject to the condition that no godown or insurance charges should be paid by Government and that delivery ± will be given immediately when desired by Government. The Minister for A. & F.D. considers that Government must have some guarantee about the delivery and desires that the draft proposed by A. & F.D' at p. 45 should be amended by the R.L.A. for that purpose.

2. Under section 30(1) of the Indian Sale of Goods Act, 1930, where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same. If the engines are allowed to continue with the Company, Government would not be able to recover them from an innocent purchaser who buys them from the Company in good faith and without notice of the provious sale. Consequently, in view of section 30(1), it is desirable that Government should take delivery of the goods, However, if it is not convenient to take delivery of the engines at this stage, it would be necessary that Government should take at least constructive delivery of the engines so that the Company mightbe considered to be holding the ~~di~~ engines thereafter as merely bailee and be liable to deliver them whenever called upon by Government. (see Elmer v. Stone, (1809) 127 E.R. 912, where it was held that if the seller

of ...

of the goods holds the goods as buyer's bailee, the buyer may be deemed to have taken constructive delivery of the goods; Iyer's law of Contracts, p. 1070). The draft letter at p. 45 as ~~amend~~ amended is appanded.

Sd/ P.N.Lad
22-10

Remembrancer of Legal Affairs.

U.R. to A. & F.D. No. 1119-A- Confl. dated the 23rd Octob 1952.

S.C. 26/6
4 copies

Legal Department.

It is true that every tender is an offer and can ne revoked or modified before it is accepted. But "unless theofferor prescribes a mode of communication of acceptance other than posting, ordinarily speaking, a letter of acceptance when posted would conclude the contract provided the letter is correctly addressed to the offeror and put into post so as not to be recalled by the acceptor." (See In Re London and Northern Bank, Ex parte, Jones, 1901 Ch. 120). In the present case it is presumed that no other mode of acceptance was prescribed by the offeror Shri Patel. The latter of acceptance was sent by Registered Post on 20-9-1951 to the address of Shri Patel and ordinarily it should have reached him before 23-9-1951. But as he had left the place the letter was returned to the Executive Engineer. On 23-9-1951 Shri Patel wrote to the Executive Engineer withdrawing his tender. It is, ~~therefore~~ therefore, apparent that as soom as the letter of acceptance was posted on 20-3-1951 there was a concluded contract and Shri Patel could not lawfully revoke his tender on 23-9-1951. Besides, it also appears tha' even before 20-9-1951 Shri Patel had come to know that the Executive Engineer had accepted his tender and the letter of acceptance was being officially sent to him. In these circumstances, it appears that Shri Patel's letter dated 23-9-1951 withdrawing his tender could not release him from the liability to fulfil the contract. The order of forfeiture of deposit appears to be correct.

Sd/- P.M.Lad
30-10-52

Remembrancer of Legal Affairs.

U.R. ~~to~~ to P.W.D. , No. 18141/A , dated the 1st ~~October~~ Nov. 1952.

It is true that under thespecial conditions of the contract Government was merely to procure licences and priorities for indigenous steel and cement and was not required to supply the Contractor with steel. However, as the work of construction of the Civil Hospital at Ahmedabad was urgently required to be expedited and as it was not possible to obtain indigenous steel in time Government offered to release Belgium steel of the required size for the construction of thework on condition of payment of price of the stock, and of thestock so taken being replenished from the quota allotted to the Civil Hospital Works. The Contractor - Messrs. Fabricated Steel and Construction Co. Ltd., Bombay, refused to accept Belgium Steel on the ground that its price was much higher than the price of indigenous steel. Government in their letter No. 1042/48/47989-Con., dated the 17th June 1950 to Messrs. Master, Sathe and Bhuta, Chartered Architects and surveyors of the Contractors requested them to advise the Contractor that the position of steel being very precarious it would be much appreciated if the Contractor accepted the Belgium Steel, so that the work would not be delayed. In reply, Messrs. Master, Sathe and Bhuta in their letter dated the 20th June 1950 informed Government that they were requesting Messrs. Fabricated Steel & Construction Co. Ltd., to take delivery of the 70 tons of Belgium Steel which was then made available to them and the difference in price would be taken account of while making up their Bills. Thereafter, Messrs. Fabricated Steel & Construction Co. Ltd., accepted 70 tons of Belgium Steel and some more tons of Belgium Steel from time to time

and paid the price thereof. The Contractors offered to replenish the Government stock after purchasing the indigenous steel and claimed the difference in price between the Belgium Steel and the Indigenous Steel. That question was considered by Government in their letter dated the 23rd May 1951 which stated that it was decided to settle the claim of the Contractor for the excess amount paid by him for the Belgium Steel ("foreign") over and above the indigenous steel after the work entrusted to him was completed. It is apparent that the Contractor never agreed to purchase Belgium Steel. It is true that the Contractor did pay the purchase price of the Belgium Steel, but on the express condition that the difference in price between the indigenous steel and the Belgium steel should be taken into account while settling their claim. This means that the Contractor accepted the Belgium Steel only on the condition that he would be required to pay the price of the indigenous steel for the quantity of Belgium steel supplied to him. It is true that Government was not under any obligation to supply steel to the Contractor, but having so supplied with a view to get the work executed as expeditiously as possible, and having impliedly agreed to refund the differences in price between the Belgium Steel supplied to him by Government, and the indigenous steel allotted to him for the Civil Hospital work, it would not now be open to Government to disclaim their liability to pay the difference in price of the two types of steel to the Contractor.

Sd. P.M.Lad
4-11

Remembrancer of Legal Affairs.

U.R. to F.D. , No, 18386/A, dated the 5th November 1952.

Office of the R.L.A.

The question whether the surety bonds executed by the servants of the former Baroda State in favour of the Ruler of Baroda can after merger be deemed to be operative is not free from doubt. In his opinion No. 15915, dated 26-9-1952 (copy attached) to the R.L.A. expressed doubts whether security bonds executed by Baroda Government servants can be considered to be operative and effective now. So far as the present case is concerned one of the sureties Shri Kallu Karim Patel is since dead. Under section 131 of the Indian Contract Act, the death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions. The guarantee given by Shri Kallu Karim Patel was a continuing guarantee (vide illustration (a) to section 129 of the Contract Act). Since that surety was not alive on the date the loss of Government money took place, it would not be legally feasible to recover the amount from his heirs. The other surety Shri Hemchand Devchand Shah had bound himself to the extent of Rs. 200/- which amount the Collector reports has been paid by him. Even if the bond is held to be operative it would not be possible to recover anything more than that. For these reasons it does not appear any further steps towards recovery of the loss can be taken in this case.

Sd/- P.M.Lad
20-11

Remembrancer of Legal Affairs

U.R. to R.D. , No. 17383/A, dated the 21st October 1952.

S.C. 26/6

4 copies.

L.D. R.I. No. 139 - Confl. dt
10-12-52

2. It is true clear from the papers that there is a dispute about theproper valuation of the equipment supplied by M/S . Coir Produce and Allied Agencies. Alleppey. The terms and conditions subject to which thegoods were ordered are not clear from thepapers; and it is also not clear whether there was any provision in the contract for valuation of the goods in the manner adopted by the Department. Any way, assuming that thefirm has received excess payment, the only way by which theover payment can be recovered is by filing a suit as advised by the Solicitor to Government in his opinion No. 309 dated the 11th January 1952 and if the Department proposes to pursue the matter, a report with all the relevant papers as required by the Law Officers Rules may be submitted to Government in Legal Department for considering the sanctioning of the suit.

Sd.-
17-12

Sd/-R.T.K.
17-12

R.L.A.
Sd. P.M.Lad
17-12

U.R. to D.D. No. 1416/A-Confl. dated 18th December 1952

S.C. 26/6

4 copies.

Office of the R.L.A.

Indian Contract Act, 1872, sec. 128.

Under section 128 of the Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. The loanee failed to utilise the loan within thespecified period for the purposes for which it was advanced, and, consequently, the loan became liable to be recovered from him before he dies. (see clause 5 of thebond). Since he failed to repay theloan, he would be deemed to have committed a default and the sureties became liable to pay the amount to Government. The surety Bond does not state that there should be a wilful default by theloanee. Consequently, there would be no legal objection to recovering the amount from the sureties as arrears of land revenue.

Sd/- F...Lad
22-11

Remembrancer of Legal Affairs.

U.R. to R.H.D. No. 19625/A , dated the 24th November 1952.

S.C. 26/6
4 copies.

question of sale by auction of the stock of yarn does not arise now. The contractor has committed breaches of the agreement even after 16th October 1952, as he has failed to adhere to the lifting programme, Govern-
and call upon him to furnish additional deposit
ment can therefore forfeit the deposit/as a guarantee for the fulfilment of the contract. It is true that Government has withheld delivery of certain bales of yarn although thecontractor has paid forthem, but there would be no point in offering these bales to him at this stage since he has already committed breaches of theagreement and if there do not appear any prospect of hisfulfilling the contract. He should, therefore, be called upon to fulfil the contract by lifting thebales of yarn in accordance with the terms of the agreement and to pay the over-storage charges. If he is agreeable and proves his bona fides, Government may agree to release the bales which have been withheld even though payment has been made for them.

So far as the third contract in respect of the sale of yarn is concerned, it appears that there is no regular contract drawn up for the purpose. However, from the letters exchanged between the Government and the contractor, it appears that a contract between the parties could be spelt. The contractor promised to lift the bales before 31-10-1952 and having failed to do so, he would be liable to the forfeiture of his deposit of Rs. 10,000 and to pay the difference between the contract price and the sale price of these goods. Notice may, therefore, be given to the contractor that, as he has failed to fulfil the contract, the bales would be sold by public auction and the difference claimed from him.

So far as the question of injunction is

concerned, it appears that what is meant is the attachment of the property of thecontractor to ensure recovery of the dues from him. For that purpose a suit will have first to be filed before any attachment of the property of the contractor could be asked for.

Sd. P.M.Lad
18-11

Remembrancer of Legal Affairs.

U.R. to Secy. C.P.D. No, 19255/A, dated 18th November 1952

S.C. 26/6
4 copies.

Office of the R.L.A.

Contract for sale of groundnut cake.

It appears that Government had purchased some stock of groundnut cake at the controlled rate of rs. 160 per ton and taking into account the transport and other charges, the economic price per ton was calculated at Rs. 200. This stock being found to be useless even for cattle feed and manurial purposes, Government decided to dispost of the stock by inviting tenders. The Kamani Oil Mills offered to purchase the whole quantity of 2,463 tons of groundnut cake on condition that Government should grant them a no-objection certificate for export. After receipt of this offer and after taking into consideration the nature of the stock and the exmmbai economic price thereof, Government decided to offer the Kamani Oil Mills thestock at the rate of Rs. 210 per ton. It appears that this offer was made orally andit is alleged that the Kamani Oil Mills were given to understand that the Bombay Government would arrange to get an export licence. In their letter dated 17th October 1952 it was stated by theKamani Oil Mills that they were prepared to accept the offer of Rs. 210 per ton for the entire quantity of old groundnut cake in possession of the Agricultural Department, of which 2,463 tons are lying in Bombay and 6,153 tons are held in small quantities in various parts of the districts and they enclosed a token for Rs. 10,000 in payment of the deposit making it explicitly clear that they would take the entire stock of groundnut cake as stated above and they would agree for the forfeiture of the deposit if they did not takethe entire stock. They further requested Government to issue a no-objection certificate for the export of the quantity they were taking delivery of in Bombay.

and a no-objection certificate for the remaining lot as and when they take delivery of it. Government accepted the offer and issued a no-objection certificate on 17-10-1952. On 21st October 1952 the Kamani Oil Mills replied that the no-objection certificate issued by Government was considered by the Export Controller, Bombay, as without jurisdiction since the power to issue such licence vested in the Central Government and in that letter it was stated that the contract was definitely based on the understanding that an export licence would be given and consequently the contract would be valid only if the export licence was so given. In the meantime, the question about the export licence was considered quota was fixed by the Government and as the export quota was fixed by the Government of India and as, in spite of the no-objection certificate by the Bombay Government, only such quantity would be permitted to be exported finally as would fall within the maximum export quota fixed by the Government of India, it was, considered necessary to approach the Central Government for the export licence. In reply, to the letter of Kamani Oil Mills dated 21st October 1952, Government wrote:

> "The "No-objection" certificate was accordingly given to you on the 17th October 1952. Government is however trying to secure from the Government of India the requisite permission for exporting the entire quantity of groundnut cake lying in storage. Meanwhile, if you are still interested in purchasing the stock of groundnut cake, you are requested to deposit into the Reserve Bank of India an amount of Rs. 5,00,000 in addition to theamount of Rs. 10,000 which you have already deposited. "

In spite of repeated requests of the Bombay Govern-ment, the Central Government has refused to issue an export licence for the export of groundnut cake. The Kamini Oil Mills have refused to fulfil the contract and asked the return of the deposit of Rs. 10,000. The question raised for the R.L.A.'s consideration are :

(1) Whether the Kamini Oil Mills can be held responsible for thefulfilment of the contract ; and

(2) whether thedeposit of Rs. 10,000 can be forfeited.

It is true that the KAMANI Oil Mills in their letter dated the 14th October 1952 only stipulated for a no-objection certificate for export and such certificate has been issued by the Bombay Government. But it is alleged by the Kamani Oil Mills that the understanding between the parties was that the export licence should be secured forthem. There is nothingon record to elucidate this point. But it appears that the intention of the parties was that facilities have to be offered to the Kamani Oil Mills for the export of the stock for, thestock being useless even forcattle feed and manurial purpose, could not be sold at a price higher than Rs. 140 per ton and the Kamani Oil Mills would not have offered a rate of Rs. 210 per ton if it were not forthepurpose of export of the stock. It appears also that the Bombay Government knew that an export quota has been fixed by the Central Government andthe no-objection certificate issued by the Bombay Government would be useless unless the export licence were ~~issue~~ issued by the Central Government. The Government's letter dated 1st November 1952 is very important in this respect. In that letter it is stated that "Government is trying to secure from the Government ofIndia therequisite permission for exporting the entire quantity of groundnut cake lying in storage and meanwhile if you are still interested in purchasing the stock of groundnut cake, you are requested to deposit into the Reserve Bank of India an amount of Rs. 5,00,000." This letter was issued in reply to theprotest made by the Kamani Oil Mills

that the no-objection certificate issued by Bombay Government would be of no avail to them as the export licence from the Central Government would be necessary forthepurpose. It is, therefore, apparent that the statements contained in Government's letter dated 1st November 1952 concede the position that Bombay Government was trying to secure from the Government of India the requisite permission for export. It is further stated in that letter that "if you are Still interested in purchasing thestock of groundnut cake, you are requested to deposit the amount of Rs. 5,00,000 This statement impliedly gives liberty to the Kamani Oil Mills to withdraw the offer. Reading the whole correspondence in the light of the intention of theparties, it appears that the offer was made by theKamani Oil Mills on the condition that an export licence should be obtained for them and, as Government has failed to obtain such export licence, the contract falls through. The deposit of Rs. 10,000 was paid by theKamani Oil Mills as a guarantee for fulfilment of thecontract and as the contract fell through by reason of failure of Government to obtain theexport licence, the deposit cannot be forfeited. Government will have, therefore, to return the deposit and would not be entitled to claim any compensation forthebreach of the contract.

Sd/ P.M.Lad
31-12
Remembrancer of Legal Affairs.

U.R. to A & F.D. No. 1475/A-confl. dated the 31st December 1952.

S.C. 27/6

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